

The respondent and its insurance carrier contend that Judge Frobish erred by averaging the doctors' functional impairment ratings. They argue that the Judge should have adopted Dr. Estivo's 5 percent rating because he was the treating physician and, therefore, knew more about claimant's injury than Dr. Murati. Conversely, claimant

contends the Judge should have adopted Dr. Murati's 11 percent rating as he appropriately included in his rating the radicular symptoms into the legs, which Dr. Estivo did not.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. The parties stipulated that on June 2, 1998, Mr. McLemore sustained personal injury by accident arising out of and in the course of his employment with Coleman Company, Inc. On that date, Mr. McLemore fell from a platform while operating a blow mold machine and injured his low back.
2. As of the May 1999 regular hearing, Mr. McLemore was continuing to experience occasional low back pain and occasional left leg pain and numbness.
3. Dr. Estivo began treating Mr. McLemore on August 5, 1998, and initially diagnosed lumbar strain. On October 8, 1998, Mr. McLemore reported occasional leg pain. The doctor then recommended an MRI, which indicated mild central disc protrusions at L3-4 and L5-S1 and a central disc herniation at L4-5. At their October 15, 1998 meeting, the doctor diagnosed a herniated disc at L4-5 with lumbar strain and recommended epidural injections. Believing the herniated disc to be completely asymptomatic, in November 1998 Dr. Estivo released and rated Mr. McLemore with a 5 percent whole body functional impairment according to the fourth edition of the AMA Guides to the Evaluation of Permanent Impairment (Guides).
4. Dr. Estivo saw Mr. McLemore again in December 1998 and February 1999 for complaints of radiculopathy into his legs. But when the doctor last saw Mr. McLemore in March 1999, those symptoms had apparently resolved. Further, a myelogram and CT scan taken in that same time frame indicated no sign of nerve root impingement. The doctor's final diagnosis was lumbar strain.
5. Dr. Murati examined Mr. McLemore at his attorney's request in January 1999. At that time, Mr. McLemore was complaining of low back pain and occasional pain and numbness in the left foot and pain in both hips. Dr. Murati diagnosed lumbar strain with a herniated disc at L4-5 and left meralgia paresthetica. Using the fourth edition of the AMA Guides, Dr. Murati rated Mr. McLemore's whole body functional impairment at 11 percent.
6. Judge Frobish averaged the functional impairment ratings provided by Doctors Estivo and Murati and determined that Mr. McLemore had sustained an 8 percent whole body functional impairment as a result of the June 1998 accident. The Appeals Board agrees. The Appeals Board is not persuaded that either doctor's functional impairment rating or testimony is more persuasive than the other. The difference between the doctors' ratings

is their interpretation of the source and importance of the symptoms that Mr. McLemore occasionally has in his legs. Averaging Dr. Estivo's 5 percent rating with Dr. Murati's 11 percent rating, the Appeals Board finds that Mr. McLemore has sustained an 8 percent whole body functional impairment due to the June 1998 accident.

7. The Appeals Board adopts the findings and conclusions set forth by the Judge in the Award to the extent they are not inconsistent with the above.

CONCLUSIONS OF LAW

1. The Award should be affirmed.

2. Because Mr. McLemore's back injury constitutes an "unscheduled" injury, the computation of permanent partial general disability benefits is contained in K.S.A. 1997 Supp. 44-510e. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

3. Coleman Company, Inc., argues that the Judge erred by considering Dr. Murati's functional impairment rating. In support of that argument, Coleman cites language used by the Board in Durham.¹

It is unfortunate when the parties elect to abandon the opinions of the treating physicians, instead presenting evidence from hired independent medical examiners. A treating physician would have the opportunity to evaluate an injured worker over a lengthy period of time and could develop an opinion based upon multiple examinations, tests, and a lengthy history of associating with claimant. Independent medical examiners are reduced to reviewing records of other physicians and generally have but one opportunity to examine and evaluate the claimant. As such, it becomes difficult for the trier

¹ Durham v. Cessna Aircraft Company, WCAB Docket No. 196,986 (August 1996).

of facts to place greater emphasis upon one medical opinion over another when independent medical examiners are all that are available.

The above statement recognizes that a treating physician may have an advantage in observing and noting a worker's signs and symptoms. But that advantage does not necessarily result in correctly interpreting and applying the AMA Guides. Also, it should be noted that in Durham the treating physician's opinions were not in evidence.

Because every situation is unique, it would be improper, and the Board declines, to issue an edict that a treating physician's functional impairment rating should always be given greater weight than the rating of another physician who expresses an equally credible opinion. Durham should not be interpreted to the contrary.

4. Mr. McLemore claims permanent partial disability benefits based upon his functional impairment only as he continues to work for Coleman Company, Inc. Therefore, his permanent partial general disability is 8 percent.

AWARD

WHEREFORE, the Appeals Board affirms the July 20, 1999 Award entered by Judge Frobish.

IT IS SO ORDERED.

Dated this ____ day of December 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Vincent A. Burnett, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director